

2015

Keeping Princess Peach Locked in Her Castle: Criminal Liability for Trafficking Circumvention Technology—United States v. Reichert

Jacob M. Abdo

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>



Part of the [Criminal Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Abdo, Jacob M. (2015) "Keeping Princess Peach Locked in Her Castle: Criminal Liability for Trafficking Circumvention Technology—United States v. Reichert," *William Mitchell Law Review*: Vol. 41: Iss. 4, Article 6.
Available at: <http://open.mitchellhamline.edu/wmlr/vol41/iss4/6>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**KEEPING PRINCESS PEACH LOCKED IN HER CASTLE¹:
CRIMINAL LIABILITY FOR TRAFFICKING
CIRCUMVENTION TECHNOLOGY—
UNITED STATES V. REICHERT**

Jacob M. Abdo[†]

I.	INTRODUCTION.....	1471
II.	COPYRIGHT LAW	1471
	A. <i>History of the Digital Millennium Copyright Act</i>	1472
	B. <i>Circumvention Liability Under § 1201 of the Digital Millennium Copyright Act</i>	1473
	C. <i>Criminal Prosecution for Circumvention Under § 1204 of the Digital Millennium Copyright Act</i>	1479
III.	THE REICHERT DECISION	1481
	A. <i>Facts and Procedure</i>	1481
	B. <i>The Holding</i>	1485
	C. <i>The Dissent</i>	1487
IV.	ANALYSIS	1489
	A. <i>Establishing Liability for Trafficking Circumvention Technology</i>	1489
	1. <i>Jury Instruction</i>	1489
	2. <i>Civil Liability Under § 1201(a)(2)(A)</i>	1490
	3. <i>Criminal Liability Under § 1204(a)</i>	1491
	B. <i>Consumer Rights</i>	1494
V.	CONCLUSION	1498

1. Princess Peach is a character from the highly popular video game franchise, *Mario Bros*. See Rus McLaughlin, *IGN Presents: The History of Super Mario Bros.*, IGN (Sept. 13, 2010), <http://www.ign.com/articles/2010/09/14/ign-presents-the-history-of-super-mario-bros?>. At the game’s inception, Princess Peach served as an object for the hero, Mario, to rescue from the villain, Bowser. *Id.*

† JD Candidate, William Mitchell College of Law, 2016.

I. INTRODUCTION

*Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.*²

—Thomas Jefferson

In *United States v. Reichert*, the Sixth Circuit upheld Jeffrey Reichert's criminal conviction for willfully trafficking in video game modification chips in violation of §§ 1201 and 1204 of the Digital Millennium Copyright Act (DMCA).³ On appeal, the court found that the contested, deliberate ignorance jury instruction did not constitute a reversible error.⁴ Although correctly decided based on existing law, *Reichert* highlights new concerns and issues regarding criminal prosecution under the DMCA.

Part II of this case note presents a concise history of the DMCA⁵ followed by an examination of §§ 1201⁶ and 1204⁷ of the DMCA. Part III discusses *Reichert's* facts and procedure,⁸ holding,⁹ and dissent.¹⁰ Part IV analyzes *Reichert's*¹¹ and discusses its effects on consumer rights.¹² Part V concludes that courts should reject *Reichert's* relaxed treatment of § 1204's mens rea element.¹³

II. COPYRIGHT LAW

United States copyright law is rooted in the Constitution's mandate "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive

2. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 41 (A. Lipscomb & A. Bergh eds., 1905).

3. 747 F.3d 445, 448 (6th Cir. 2014).

4. *Id.* at 447–48.

5. See *infra* Part II.A.

6. See *infra* Part II.B.

7. See *infra* Part II.C.

8. See *infra* Part III.A.

9. See *infra* Part III.B.

10. See *infra* Part III.C.

11. See *infra* Part IV.A.

12. See *infra* Part IV.B.

13. See *infra* Part V.

right to their respective writings and discoveries.”¹⁴ Under the federal copyright regime, authors are granted, for a limited time, a collection of exclusive rights in their “original works of authorship fixed in a tangible medium of expression.”¹⁵ The owner of a copyrighted work has the exclusive right to reproduce; prepare derivative works; distribute; display; and in the case of sound recordings, the right to perform the copyrighted work via digital audio transmission.¹⁶ Copyright does not exist to merely reward the author for her labors.¹⁷ The true underlying goal of copyright is to provide the quantum of protection necessary to encourage authors to create and disseminate new, original works.¹⁸

A. *History of the Digital Millennium Copyright Act*

Traditionally, the United States federal copyright regime has taken a “technology neutral” approach—regulating the use of works rather than devices or means used to access them.¹⁹ However, the digital revolution of the late twentieth century and its disruptive impact²⁰ on the production and consumption of copyrighted material prompted content industries to urge Congress to amend the copyright statute.²¹ Accordingly, Congress enacted the DMCA

14. U.S. CONST. art. I, § 8, cl. 8.

15. 17 U.S.C. § 102(a) (2012).

16. 17 U.S.C. § 106(1)–(6).

17. *See, e.g.,* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991) (rejecting “sweat of the brow” justification for copyright).

18. *See* Kenneth L. Port, *Forward: Symposium on Intellectual Property Law Theory*, 68 CHI.-KENT L. REV. 585, 587 (1993).

19. H.R. REP. NO. 105-551, pt. 2, at 24 (1998). *But see* INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 11 n.23 (1995) [hereinafter WHITE PAPER], available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf> (discussing the Audio Home Recording Act as an example of a law that combines “legal and technological” restrictions to advance consumers’ and copyright owners’ interests).

20. *See, e.g.,* WHITE PAPER, *supra* note 19, at 12 (“The emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information and information products . . .”).

21. *See Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the Comm. on the Judiciary*, 107th Cong. 11–14 (2001) [hereinafter *Section 104 Report*], available at http://commdocs.house.gov/committees/judiciary/hju76669.000/hju76669_0.htm (statement of Howard L. Berman, Ranking Member, Subcomm. on Courts, the

to combat piracy of digital works, to advance electronic commerce,²² and to implement the World Intellectual Property Organization (WIPO) Copyright Treaty.²³ Among other things, the DMCA proscribes the sale of devices that circumvent technologies that effectively protect copyrighted works.²⁴ In enacting the DMCA, Congress reasoned that the prohibition on circumvention was an important extension of the longstanding protection against copyright infringement.²⁵ Congress sought to maintain the balance between the interests of copyright owners and consumers by carving out “breathing space” for the fair use of copyrighted material.²⁶ Commentators, however, were quick to note that the DMCA expanded the scope of copyright protection and provided copyright holders a substantial new control over the means of distribution.²⁷

B. Circumvention Liability Under § 1201 of the Digital Millennium Copyright Act

Section 1201 of the DMCA proscribes the circumvention of technologies that effectively protect copyrighted content.²⁸ Circumvention is defined as the “descrambling, decrypting,

Internet, and Intellectual Property).

22. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, at v (2001) [hereinafter REPORT OF THE REGISTER].

23. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001) (“The DMCA was enacted in 1998 to implement the World Intellectual Property Organization (WIPO) Copyright Treaty which requires contracting parties to ‘provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures . . . which are not authorized by the authors concerned or permitted by law.’” (quoting World Intellectual Property Organization (WIPO) Treaty, art. 11, Apr. 12, 1997, 21 U.S.T. 1749, 2186 U.N.T.S. 121)).

24. For further discussion of the DMCA’s prohibition on circumvention, see *infra* Part II.C.

25. S. REP. NO. 105-190, at 12 (1998) (“The copyright law has long forbidden copyright infringements, so no new prohibition was necessary.”).

26. *Corley*, 273 F.3d at 443 n.13.

27. See, e.g., Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 519 (1999) (discussing the reach of the DMCA); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 819 (2001) (discussing technological control over dissemination).

28. 17 U.S.C. § 1201 (2012).

avoiding, bypassing, removing, deactivating or impairing” of technological protection measures (TPMs) through technological means.²⁹ Circumvention is often likened to “digital trespass,”³⁰ and circumvention technology is likened to a “skeleton key.”³¹

Congress justified the prohibition against circumvention on the grounds that it brought copyright infringement into the digital era.³² Commentators have roundly rejected this assertion, finding that circumvention liability represents “an unprecedented departure” into the regulation of devices under the guise of copyright law.³³

There are two categories of circumvention liability under the DMCA: “access control” and “copy control.”³⁴ Access control liability prohibits circumventing an access control TPM³⁵ as well as trafficking in access control circumvention technology.³⁶ Whereas copy control liability only prohibits trafficking technology that circumvents a copy control TPM,³⁷ the act of circumventing a copy

29. *I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc.*, 307 F. Supp. 2d 521, 532 (S.D.N.Y. 2004) (holding that circumvention does not occur when the defendant has permission to “move through” the plaintiff’s technological protective measure).

30. *See, e.g., Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1196 (Fed. Cir. 2004).

31. *See, e.g., Corley*, 273 F.3d at 453–54 (likening circumvention software to a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store’s products).

32. *Accord Chamberlain*, 381 F.3d at 1195; *see* S. REP. NO. 105-190, at 12 (1998).

33. H.R. REP. NO. 105-551, pt. 2, at 24 (1998) (discussing a letter sent to Congress signed by sixty-two copyright law professors expressing concern regarding the regulation of devices in the name of copyright law); *see also* Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2202 (2000) (“The protection of expression . . . is for the first time achieved through the regulation of devices.”).

34. 17 U.S.C. § 1201(a)–(b) (2012).

35. *Id.* § 1201(a)(1) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”).

36. *Id.* § 1201(a)(2) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title . . .”).

37. *Id.* § 1201(b)(1) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that

control TPM is not itself prohibited under the DMCA.³⁸ This is because circumventing a copy control TPM is essentially copyright infringement under § 106(1).³⁹ Because a single device may function as both an access control and a copy control TPM,⁴⁰ a single act of circumvention can violate both § 1201(a) and § 1201(b).⁴¹

For liability to attach in a § 1201(a)(2) trafficking action, a plaintiff

must prove: (1) ownership of a valid *copyright* on a work, (2) [that is] effectively controlled by a *technological measure*, which has been circumvented, (3) that third parties can now *access* (4) *without authorization*, in a manner that (5) infringes or facilitates infringing a right *protected* by the Copyright Act, because of a product that (6) the defendant either (i) *designed or produced* primarily for circumvention; (ii) made available despite only *limited commercial significance* other than circumvention; or (iii) *marketed* for use in circumvention of the controlling technological measure.⁴²

effectively protects a right of a copyright owner under this title in a work or a portion thereof . . .”).

38. See *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1112 (C.D. Cal. 2007) (“Sections 1201(a)(2) and 1201(b)(1) differ only in that 1201(a)(2), by its terms, makes it wrongful to traffic in devices that circumvent technological measures that *control access to protected works*, while 1201(b)(1) makes it wrongful to traffic in devices that circumvent technological measures that *protect rights of a copyright owner in a work*.”).

39. See 17 U.S.C. § 106(1) (“[T]he owner of copyright under this title has the exclusive rights to . . . reproduce the copyrighted work in copies or phonorecords . . .”); S. REP. NO. 105-190, at 12 (1998).

40. See, e.g., *Apple, Inc. v. Psystar Corp.*, 673 F. Supp. 2d 931, 941–42 (N.D. Cal. 2009) (finding a likely violation of both § 1201(b)(1) and § 1201(a)(2) when a computer software’s “access control” was circumvented and the program was subsequently copied to the computer’s RAM when the program was loaded), *aff’d in relevant part*, 658 F.3d 1150, 1152 (9th Cir. 2011). See generally *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (“[I]t is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act.”).

41. See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1095 (N.D. Cal. 2004).

42. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004).

Under § 1201, a technology's primary purpose is determined by its function and not the creator's subjective intent.⁴³ Further, a TPM that is easily circumvented may still effectively control access to a work.⁴⁴ The circuits are split regarding whether a plaintiff must establish a relationship between the alleged circumventing technology and copyright infringement.⁴⁵ The Federal Circuit holds that a § 1201 plaintiff must establish a "nexus to infringement" between the circumvention technology at issue and the copyrighted material.⁴⁶ The Ninth Circuit, however, requires no such nexus.⁴⁷ The circuits also disagree about whether a plaintiff must show that the defendant lacked the copyright owner's permission to circumvent.⁴⁸ The Federal Circuit holds that a § 1201 plaintiff must show that the third party engaged in unauthorized access of copyrighted content using the technology in question,⁴⁹ whereas the Second Circuit holds that liability attaches whenever circumvention occurs.⁵⁰

43. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 457 (2d Cir. 2001) (rejecting that intent to cause harm is required); *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 939 (N.D. Cal. 2009) ("[T]here is no intent element to the element of circumventing protection afforded by a technological measure" (internal quotation marks omitted)); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 318 (S.D.N.Y. 2000) (holding that motivation is immaterial).

44. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 549 (6th Cir. 2004) (commenting that a TPM does not need to be "an impervious shield" to effectively control access to a copyright-protected work); see also *321 Studios*, 307 F. Supp. 2d at 1095 (stating that a TPM may still effectively protect copyrighted work despite the availability of circumvention technology).

45. See *United States v. Reichert*, 747 F.3d 445, 458 (6th Cir. 2014) (Donald, J., dissenting) ("[T]he circuit split is representative of an ongoing debate over the . . . scope of the DMCA's anti-circumvention provision [regarding] whether certain applications of § 1201 have undermined the delicate balance that Congress sought to achieve between strengthening copyright law and preserving consumer rights . . . in our increasingly digitized culture.").

46. *MDY Indus., LLC v. Blizzard Entm't, Inc.* 629 F.3d 928, 949 (9th Cir. 2010) (discussing the "nexus to infringement" requirement in the Federal Circuit as found in *Chamberlain*, 381 F.3d at 1192–1203).

47. See *id.* (declining to adopt "nexus to infringement").

48. *Id.* at 953 n.16.

49. See *Chamberlain*, 381 F.3d at 1193.

50. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001); accord *United States v. Crippen*, No. CR 09–703 PSG, 2010 WL 7198205, at *2 (C.D. Cal. Nov. 23, 2010) (citing *Corley* with approval).

The DMCA established several exceptions to circumvention liability. First, the Act incorporated traditional defenses against copyright infringement—such as fair use—into its statutory framework.⁵¹ Second, the Act enumerated eight permissible types of circumvention.⁵² Third, the Act charged the Library of Congress⁵³ to evaluate and create further statutory exemptions to circumvention liability.⁵⁴ Factors relevant to the Library of Congress's inquiry include:

(1) the availability for use of copyrighted works; (2) the availability for use of works for nonprofits archival, preservation, and educational purposes; (3) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (4) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (5) such other factors as the Librarian considers appropriate.⁵⁵

The Library of Congress has shielded eight classes of technology from circumvention liability⁵⁶ including read-aloud software that assists disabled persons to read electronic works,⁵⁷

51. 17 U.S.C. § 1201(c) (2012) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use . . .”).

52. See *id.* § 1201(d)–(j). The following entities are immunized from circumvention liability: nonprofit libraries, archives, educational institutions, law enforcement, intelligence, and other government security agencies. *Id.* Further, circumvention liability does not attach when circumvention is undertaken for the following purposes: reverse engineering, encryption research, protecting minors, and protection of personally identifying information. *Id.*

53. See *id.* § 1201(a)(1)(C) (“[The Library of Congress acts] upon the recommendation of the Register of Copyrights, who . . . consult[s] with the Assistant Secretary for Communications and Information of the Department of Commerce.”).

54. *Id.* § 1201(a)(1)(B)–(C).

55. *Id.* § 1201(a)(1)(C)(i)–(v). The constitutionality of this process has been questioned on the grounds that the Librarian of Congress is not a member of the executive branch and thus lacks requisite authority to make these recommendations. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 559 n.209 (1999).

56. See 37 C.F.R. § 201.40 (2014).

57. *Id.* § 201.40(b)(1).

computer programs that permit cellular telephones to be used on a different wireless network,⁵⁸ and technologies that circumvent DVD Content Scrambling Systems when circumvention is necessary to produce high-quality content required for educational purposes.⁵⁹

The DMCA affords few defenses for a defendant charged with trafficking circumvention technology. For example, fair use⁶⁰ is not a recognized defense against trafficking liability because circumvention—not copyright infringement—is the punishable offense.⁶¹ Of the enumerated exceptions, only the law enforcement, reverse engineering, encryption research, and security testing apply to the anti-trafficking provision.⁶² Further, the exceptions adopted by the Library of Congress are not applicable to a § 1204 defendant.⁶³

58. *Id.* § 201.40(b)(3).

59. *Id.* § 201.40(b)(4).

60. “[T]he fair use of a copyrighted work . . . is not an infringement of copyright.” 17 U.S.C. § 107. Factors relevant to the determination of whether a work was fairly used include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

61. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001) (noting that circumvention is a standalone offense); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000) (observing that Congress “deliberate[ly]” chose to exclude fair use as a defense); *see also* 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1097–98 (N.D. Cal. 2004) (holding that permissible subsequent use does not negate trafficking liability).

62. *See* 17 U.S.C. § 1201(d)–(j). Justification for this rests upon Congress’s desire to “provide meaningful protection and enforcement of the copyright owner’s right to control access to his or her copyrighted work” S. REP. NO. 105-190, at 28–29 (1998).

63. 17 U.S.C. § 1201(a)(1)(E) (“Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.”).

C. *Criminal Prosecution for Circumvention Under § 1204 of the Digital Millennium Copyright Act*

Section 1204 of the DMCA established criminal liability for “[a]ny person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain.”⁶⁴ Penalties are severe. A first time offense carries a maximum fine of \$500,000, five years imprisonment, or both.⁶⁵ Subsequent offenses carry a maximum fine of \$1,000,000, ten years imprisonment, or both.⁶⁶ In criminal copyright prosecution, civil copyright case law has precedential value.⁶⁷ This applies to jury instructions as well.⁶⁸

For criminal liability to attach under § 1201(a)(2) and § 1204 of the DMCA, the government must prove that the defendant:

(1) willfully (2) manufactured or trafficked in (3) a technology, product, service, or part thereof (4) that either: (a) is primarily designed or produced for the purpose of (b) ‘has only limited commercially significant purpose or use other than’ or (c) ‘is marketed by that person or another acting in concert with that person with that person’s knowledge for use in’ (5) circumventing an access control without authorization from the copyright owner (6) for commercial advantage or private financial gain.⁶⁹

Some commentators suggest that in its effort to deter digital piracy of copyrighted works, the government will increasingly rely on criminal prosecution for copyright infringement.⁷⁰ There is merit to this argument, especially when the infringer is civilly

64. *Id.* § 1204(a).

65. *Id.* § 1204(a)(1).

66. *Id.* § 1204(a)(2).

67. *See* United States v. Wise, 550 F.2d 1180, 1188 n.14 (9th Cir. 1977).

68. *See* United States v. Cross, 816 F.2d 297, 303 (7th Cir. 1987).

69. U.S. DEP’T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES 253 (4th ed. 2013) [hereinafter PROSECUTING IP CRIMES] (quoting 17 U.S.C. § 1201(a)(2)) (citing 17 U.S.C. § 1204), available at http://www.justice.gov/criminal/cybercrime/docs/prosecuting_ip_crimes_manual_2013.pdf.

70. *See* Jonathan Bick, *Internet Copyright Infringement: An Emerging White-Collar Crime* Internet, BICKLAW.COM, www.bicklaw.com/Publications/InternetCopyrightInfringement.htm (last visited Apr. 26, 2015) (hypothesizing that public policy will spur governments to seek criminal prosecution for Internet copyright infringement).

judgment-proof.⁷¹ To date, the United States has pursued relatively few criminal prosecutions under § 1204.⁷² As of January 2015, a Westlaw search produced eight § 1204 criminal proceedings.⁷³ Of these cases, only one is designated as a published appellate opinion: *United States v. Reichert*.⁷⁴

The lack of appellate case law and the relative complexity of §§ 1201 and 1204 has produced confusion among the courts. For example, in *Reichert*, the trial court all but ignored § 1204's mens rea element when it issued a jury instruction that effectively made the sale of circumvention technology a strict liability offense.⁷⁵ On appeal, the Sixth Circuit declined to construe the scope and reach of the crime's mens rea.⁷⁶ This sets dangerous precedent for future § 1204 prosecutions.

71. See Evan D. Brown, *Online Copyright Infringement Presents Some Special Issues*, 21 DUPAGE COUNTY B. ASS'N BRIEF 20, 22 (2008) ("judgment proof" infringer). See generally Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236–41 (1985) (stating that nonmonetary sanctions may be a more effective deterrent than monetary sanctions under certain economic conditions).

72. For a complete list of § 1204 prosecutions, see *infra* note 73.

73. See *United States v. Reichert*, 747 F.3d 445 (6th Cir. 2014); *United States v. Silvius*, 559 F. App'x 490 (6th Cir. 2014); *United States v. Wittich*, Criminal Action No. 14–35, 2014 WL 5113315 (E.D. La. Oct. 10, 2014); *United States v. Nosal*, 930 F. Supp. 2d 1051 (N.D. Cal. 2013); *United States v. Hucks*, Criminal Action No. 11–326, 2013 WL 654397 (E.D. Pa. Feb. 20, 2013); *United States v. Xiang Li*, Crim. No. 10–112–LPS–1, 2012 WL 5379102 (D. Del. Oct. 31, 2012); *United States v. Crippen*, No. CR 09–703 PSG, 2010 WL 7198205 (C.D. Cal. Nov. 23, 2010); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

74. 747 F.3d 445. The methodology used to conduct this study was as follows: first, Author entered "17 U.S.C. 1204" into the Westlaw database; second, Author selected the "Citing References" tab on Westlaw page that corresponded to the statute; third, Author read each case contained within the "Citing References" page to confirm that § 1204 was the dispositive issue.

75. *Id.* at 449–50; see also Proposed Jury Instruction at 2–3, *United States v. Reichert*, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013) (documenting the defendant's proposed jury instructions).

76. *Reichert*, 747 F.3d at 451.

III. THE REICHERT DECISION

A. *Facts and Procedure*

Jeffrey J. Reichert operated a video game console modification business.⁷⁷ For a fee, Reichert modified game consoles to bypass the device's TPM.⁷⁸ When properly attached to the printed circuit board, a modification chip circumvents the game console's TPMs.⁷⁹ Manufacturers install TPMs to prevent the console from running pirated or otherwise unauthorized games.⁸⁰

Prior to his arrest, Reichert was an active contributor to an online discussion forum dedicated to the topic of video game console modification.⁸¹ The online discussion forum⁸² served as a virtual clubhouse where enthusiasts discussed various ways to modify video game consoles.⁸³ Although only possessing a high school diploma, Reichert was regarded among the forum members as a capable video game console modifier.⁸⁴ Reichert routinely advised members about the different types of modification chips,⁸⁵ where to obtain pirated video games, and how to conceal modifications from console manufacturers.⁸⁶ Although some members may have been unaware of the illegal nature of their

77. See *id.* at 448 (noting that federal agents seized, among other things, "business cards advertising Reichert's services" when they raided his residence where he also conducted business).

78. *Id.*

79. *Id.* at 449, 456.

80. See generally Phillip A. Harris Jr., *Mod Chips and Homebrew: A Recipe for Their Continued Use in the Wake of Sony v. Divineo*, 9 N.C. J.L. & TECH. 113, 117 (2007) (discussing how modification chips are used to enhance video game console functionality and circumvent technological protection measures).

81. *Reichert*, 747 F.3d at 448.

82. See X-BOX-SCENE, http://www.xbox-scene.com/modchips4_table.htm (last updated Mar. 11, 2007) (providing technical specifications and other data on various modification chips).

83. *Reichert*, 747 F.3d at 449.

84. *Id.* at 449, 454. Among members, Reichert was known as "the only person . . . that knew there was another way . . . to modify a certain type of console." *Id.* at 449.

85. *Id.* at 449. In one such post, Reichert told a member of the forum that a certain modification chip was "the best chip for sure," but warned the novice gamer that he risked "screw[ing] stuff up" if he installed the chip improperly. *Id.*

86. *Id.*

activities, Reichert posted a comment stating, “[w]e aren’t technically supposed to do [installs],” but “no one cares.”⁸⁷

Unbeknownst to Reichert, the forum had become the focus of a joint Department of Homeland Security and Immigration and Customs Enforcement (ICE) anti-piracy investigation, code named Operation Tangled Web.⁸⁸ In 2007, an undercover ICE agent contacted Reichert seeking to buy a modified Nintendo Wii.⁸⁹ Reichert agreed.⁹⁰ Reichert purchased a Nintendo Wii, modified the console, and sold the illicit device to the agent for a \$50 profit.⁹¹ Thereafter, employees of Nintendo, Inc., serving as experts for the United States, verified that the Wii had been successfully “hard-modded with a Wii Key mod chip” and was capable of playing pirated video games.⁹²

Agents searched Reichert’s residence and the garage of his friend, Kevin Belcik,⁹³ where they discovered modification chips, a soldering iron, computers, and business cards advertising Reichert’s services.⁹⁴ Reichert admitted to agents that he “knew the mod chips were in a gray area,” but he did not believe that it was illegal to sell and install the chips.⁹⁵

Reichert was subsequently charged under §§ 1201(a)(2)(A) and 1204(a) of the DMCA.⁹⁶ At trial, Jason Allen, an Internet piracy

87. *Id.*

88. *Id.* at 456.

89. *Id.* at 448. Nintendo Wii is a popular video game console that was introduced by Nintendo Co., Ltd. in 2006. *See Company History*, NINTENDO, <http://www.nintendo.com/corp/history.jsp> (last visited Apr. 24, 2015).

90. *Reichert*, 747 F.3d at 448.

91. *Id.*

92. *See* Exhibit A at 5, *United States v. Reichert*, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013). The modified Nintendo Wii successfully loaded and ran a pirated version (i.e., an unauthorized copy) of Super Paper Mario (DVD-R format). *See id.* Had the console’s technological protection measures been functioning correctly, the Wii would have produced an error message and prohibited game play when the pirated game was placed in the device. *See id.*

93. *Reichert*, 747 F.3d at 448.

94. *Id.*

95. *Id.* at 449.

96. 17 U.S.C. § 1201(a)(2)(A) (2012) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.”); *Reichert*, 747 F.3d at 448 (noting Reichert’s charge and when “[c]ircumventing or trafficking in

specialist with Nintendo testified that the “primary purpose” of modification chips [was] to enable a user to play pirated video games.”⁹⁷ The witness then explained how the Wii video game console would be disassembled and the modification chip soldered to the device’s circuit board.⁹⁸ In the witness’s opinion, the modification process was a “‘pretty complicated process,’ given that the modifier need[ed] to identify the proper locations to . . . attach the wires and because holding a soldering iron . . . for too long could damage the [circuit] board.”⁹⁹ Although evidence tended to show “that Reichert did not knowingly order his modified chips from an international source,” Allen testified, “it is pretty well known among the community that in the United States mod chips without licenses are illegal.”¹⁰⁰

In his defense, Reichert argued that he believed that modifying video game consoles was legally permissible.¹⁰¹ Reichert’s sole witness, Kevin Belcik, testified that Reichert had received instruction on building personal computers from a high school vocational program.¹⁰² Belcik then attempted to testify that modifying a video game console required the same basic knowledge that Reichert had learned in the vocational program.¹⁰³ The court sustained the government’s objection to this testimony and further disallowed Belcik from stating whether Reichert believed that modifying video game consoles was against the law.¹⁰⁴

Over Reichert’s objection, the district court adopted the government’s proposed deliberate ignorance jury instruction.¹⁰⁵ The instruction stated that the jury “may find that [Reichert] knew he was violating the Digital Millennium Copyright Act . . . [if he] deliberately ignored a high probability that he was trafficking in technology primarily designed to circumvent technological

circumvention tools in violation of § 1201 is a criminal offense” under § 1204(a)).

97. *Reichert*, 747 F.3d at 449; see also Brief of Appellee at 10, *Reichert*, 747 F.3d 445 (No. 13-3479), 2013 WL 3185706.

98. *Reichert*, 747 F.3d at 449.

99. *Id.*

100. *Id.*; see also Brief of Appellee, *supra* note 97, at 13.

101. *Reichert*, 747 F.3d at 452–53.

102. *Id.* at 449.

103. *Id.*

104. *Id.* Had Belcik testified, he would have stated that Reichert “believed that modifying the hardware was legal . . .” *Id.*

105. *Id.* at 449–50.

measures designed to effectively control access to a work copyrighted under federal law.”¹⁰⁶

In his proposed jury instructions, Reichert unpersuasively argued that the deliberate ignorance instruction proposed by the government was incorrect and instead should be replaced by a willful standard, “meaning he knew he was violating the law.”¹⁰⁷ Reichert also failed to persuade the district court that the jury should have been instructed about the non-infringing ways modifications chips are used.¹⁰⁸

Before delivering its deliberate ignorance instruction, the district court instructed the jury on willfulness, stating:

As used in these instructions, an act is done willfully if it is done voluntarily and intentionally with the intent to do something unlawfully, that is, with the intent either to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids, the person need not be aware of the specific law or the rule his conduct is violating. Willfulness requires the Government to prove that the law imposed a duty on the Defendant, that the Defendant knew of this duty, and that he voluntarily and intentionally violated that duty.¹⁰⁹

The district court then delivered its deliberate ignorance instruction, which stated, in relevant part:

If you are convinced that the Defendant deliberately ignored a high probability that he was trafficking in technology primarily designed to circumvent technological measures designed to effectively control access to a work copyrighted under federal law, then you

106. *Id.*

107. Proposed Jury Instruction, *supra* note 75, at 2–3.

108. *Id.* at 3–5. Reichert correctly noted that the owner of a computer program may legally copy that program for archival purposes provided that the copy is destroyed should the holder lose the right to possess the original version. *See* Brief of Appellant at 5–7, *Reichert*, 747 F.3d 445 (No. 13-3479), 2013 WL 2470411, at *5–7. Additionally, Reichert correctly stated that a rightful owner of software purchased legally from another region might be using a lawfully installed modification chip to circumvent that software’s technological protective measures. *See id.*

109. *Reichert*, 747 F.3d at 450.

may find that he knew he was violating the Digital Millennium Copyright Act.¹¹⁰

Reichert was convicted for violating §§ 1201(a)(2)(A) and 1204(a) of the DMCA.¹¹¹ Over objection, Reichert's sentence was increased on the grounds that his "crime was facilitated by his possession of technical computer skills 'not . . . possessed by members of the general public.'"¹¹² Although the district court noted that Reichert was "getting a tough deal," it denied his motion for a reduced sentence.¹¹³ Reichert was sentenced to twelve months and one day of imprisonment.¹¹⁴ An appeal followed.¹¹⁵

B. *The Holding*

The Sixth Circuit addressed three fundamental issues in *Reichert*.¹¹⁶ The first issue was whether the deliberate ignorance jury instruction negated § 1204(a)'s willful mens rea element.¹¹⁷ The second issue was whether the exclusion of Belcik's testimony violated Reichert's constitutional right to present a defense.¹¹⁸ The third issue was whether the district court erred in applying the special skills enhancement to Reichert's sentence.¹¹⁹

For criminal liability to attach under § 1204(a), the government must show that the accused acted "willfully and for purposes of commercial advantage or private financial gain."¹²⁰ Reichert conceded that a showing of willful blindness would satisfy the crime's mens rea.¹²¹ However, Reichert argued that the deliberate ignorance instruction "eviscerated" § 1204(a)'s mens rea element "by allowing the jury to convict him upon finding *only* that he [deliberately ignored a high probability] that he was trafficking

110. *Id.*

111. *Id.*; see also *United States v. Reichert*, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013), *aff'd*, 747 F.3d 445.

112. *Reichert*, 747 F.3d at 450.

113. *Id.*; see also *United States v. Reichert*, No. 1:12 CR 177 (N.D. Ohio Apr. 10, 2013) (memorandum opinion and order denying defendant's motion to impose alternative sentence) (describing sentencing in detail).

114. *Reichert*, 747 F.3d at 450.

115. *See id.*

116. *See id.* at 447.

117. *Id.* at 451.

118. *Id.* at 453.

119. *Id.* at 454.

120. 17 U.S.C. § 1204(a) (2012).

121. *Reichert*, 747 F.3d at 451–52.

in circumvention technology, rather than [a finding that] he knew that he was *violating the law* by trafficking in [circumvention] technology.”¹²² Reichert did not challenge the jury’s findings.¹²³

The court acknowledged that § 1204(a)’s mens rea element was a matter of first impression, but it declined to interpret its scope.¹²⁴ Instead, the court held “that a defendant need not be aware of the specific provision of law that his conduct violates, as long as he is aware that his act is illegal.”¹²⁵ The court reasoned that because the instruction was “sandwiched”¹²⁶ in between clarifying language, the deliberate ignorance principles were “substantially covered” and the crime’s mens rea requirement remained intact.¹²⁷

The court dispensed with Reichert’s argument that “the instruction failed to properly reflect that a defendant is willfully blind only if he took ‘deliberate action’ to avoid actual knowledge” on the grounds that the language was taken from a pattern jury instruction that has “repeatedly” been upheld.¹²⁸ The court held that although “mildly imprecise,” “when viewed ‘as a whole,’ the jury instructions . . . properly instructed the jury on the issue of willfulness.”¹²⁹ The court speculated that the jury had found Reichert acted willfully because he stated that he was operating in a “‘gray’ area of the law.”¹³⁰

The court also rejected that the exclusion of Belcik’s testimony violated Reichert’s constitutional right to present a defense.¹³¹ The exclusion of evidence offends the Constitution when done arbitrarily or disproportionately.¹³² The court found that the proffered testimony “had only marginal relevance to whether

122. *Id.* at 451 (emphasis added).

123. *Id.* at 453.

124. *Id.* at 451.

125. *Id.*

126. *Id.* at 452.

127. *Id.* at 453 n.2.

128. *Id.* at 451. *See generally* KEVIN F. O’MALLEY, JAY E. GREINIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17:09 (6th ed. 2006) (discussing the Sixth Circuit’s “repeated[] approv[al]” of the Sixth Circuit Pattern Criminal Jury Instruction on “deliberate ignorance”).

129. *Reichert*, 747 F.3d at 452 (quoting *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007)).

130. *Id.* at 452–53.

131. *Id.* at 454.

132. *Id.* at 453 (citing *Holmes v. South Carolina*, 547 U.S. 319, 324–26 (2006)).

Reichert believed . . . that his conduct was legal” because Belcik had been away during the time in question.¹³³

Finally, the court was unmoved by Reichert’s argument that special skills sentencing enhancement was improper.¹³⁴ Citing Reichert’s half-decade of experience modifying consoles, his adeptness with a soldering iron, and his reputation in the game modification community, the court found that Reichert possessed requisite “special skills” to warrant the sentencing enhancement.¹³⁵ Accordingly, the Sixth Circuit upheld Reichert’s conviction and sentence.¹³⁶

C. *The Dissent*

Judge Bernice Donald issued the court’s dissenting opinion.¹³⁷ Citing the numerous statutory exceptions to circumvention liability, § 1201’s legislative history,¹³⁸ and subsequent congressional action,¹³⁹ Judge Donald found that Reichert’s appeal must be analyzed through the lens of the modification chip’s uncertain legal standing.¹⁴⁰ Judge Donald determined that for criminal

133. *Id.* at 454.

134. *Id.* at 454–55.

135. *Id.* at 448–49, 455. In its determination, the court relied heavily on testimony provided by the prosecution’s expert witness—an employee of Nintendo Ltd.—who stated, among other things, that the “modification of a game system can be a pretty complicated process.” *Id.* at 455 (internal quotation marks omitted); *see also* Exhibit A, *supra* note 92, at 7.

136. *Reichert*, 747 F.3d at 455.

137. *Id.* (Donald, J., dissenting).

138. *Id.* at 460 (citing Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,570 (Oct. 27, 2000) (codified at 37 C.F.R. § 201)) (“[T]he Librarian of Congress considered, but ultimately declined to create an exemption for mod[ification] chips . . . based on its reasoning that § 1201(f) was sufficient to safeguard against legitimate users of mod[ification] chips . . . from adverse action.”).

139. *See id.* at 460 n.3. At the time the Sixth Circuit heard Reichert’s case, there were two bills presented to Congress that would alter the Act’s “framework” by, among other things, requiring a nexus to infringement. *Id.* (citing Unlocking Consumer Choice and Wireless Competition Act, H.R. 1123, 113th Cong. (2014); Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. (2013)). However, these bills have not been passed into law.

140. *Reichert*, 747 F.3d at 460 (Donald, J., dissenting).

liability to attach under § 1204, the defendant must know that selling modified video game consoles is illegal.¹⁴¹

Under this standard, the instruction should have stated that Reichert willingly violated § 1201 if he “deliberately ignored a high probability that *he was breaking [a] law* designed to effectively control access to a work copyrighted under federal law” as opposed to “deliberately ignored a high probability that *he was trafficking in technology primarily designed to circumvent technological measures* designed to effectively control access to a work copyrighted under federal law.”¹⁴²

Judge Donald found that the instruction given by the trial court “directly undermined Reichert’s only defense” and “permitted the jury to deliver a guilty verdict upon a lesser finding than the statute’s willfulness requirement.”¹⁴³ The judge rejected the majority’s position that the deficient portion of the instruction was cured because it was “sandwiched between two proper statements of the law.”¹⁴⁴ Because the court could “do no more than guess at what the jury might have done . . . [if] properly instructed,” the instruction constituted a reversible error.¹⁴⁵

Finding that § 1204’s mens rea requirement was “arguably open to various interpretations,” Judge Donald argued that the rule of lenity should apply.¹⁴⁶ This doctrine, which requires criminal statutes to “provide fair warning,” mandated that the Government conclusively establish that Reichert acted with the requisite mens rea.¹⁴⁷ Judge Donald found that the deliberate ignorance jury instruction improperly “convoluted the scienter element of the charge and aggravated the already heightened risk of error stemming from a statute that was itself” ambiguous and impermissible.¹⁴⁸

Citing the “overwhelming evidence” that established Reichert’s defense, “the ongoing debate over the scope of the DMCA’s anti-

141. *Id.* at 461 (citing *Bryan v. United States*, 524 U.S. 184, 192 (1998)) (“[T]he Government must prove that the defendant acted with knowledge that his conduct was unlawful.”).

142. *Id.*

143. *Id.* at 462 (citing 17 U.S.C. § 1204 (2012)).

144. *Id.* (internal quotation marks omitted).

145. *Id.* (quoting *Davis v. Georgia*, 451 U.S. 921, 922–23 (1981)).

146. *Id.*

147. *Id.* at 462–63 (quoting *Liparota v. United States*, 471 U.S. 419, 427–28 (1985)).

148. *Id.* at 463.

circumvention provision,” and contemporary legal scholarship, Judge Donald found that had the jury received the correct deliberate ignorance instruction, it would have been “highly improbable” that Reichert would have been convicted.¹⁴⁹

IV. ANALYSIS

A. *Establishing Liability for Trafficking Circumvention Technology*

The majority held that the jury instruction, “viewed ‘as a whole,’” sufficiently conveyed § 1204’s willfulness requirement because the contested portion of the instruction was “sandwiched between” passages that properly stated the crime’s mens rea.¹⁵⁰ Accordingly, the court upheld Reichert’s conviction.¹⁵¹ Although Reichert purported to have avoided interpreting the scope of § 1204(a)’s mens rea element,¹⁵² it is useful to analyze the case and evaluate its likely impact on future §§ 1201(a)(2)(a) and 1204 prosecutions.

1. *Jury Instruction*

The district court instructed the jury to deliver a guilty verdict if Reichert “deliberately ignored a high probability that he was trafficking in technology primarily designed to circumvent technological measures designed to effectively control access to a work copyrighted under federal law.”¹⁵³

This instruction was flawed because it unnecessarily conflated the issue of trafficking circumvention technology with the technology’s primary purpose. In one sentence, the instruction asked the jury to determine whether Reichert was “trafficking in [a] technology” and if that technology was “primarily designed to circumvent” TPMs that effectively protect copyrighted work.¹⁵⁴ The instruction was defective because an affirmative response to trafficking may have dictated an affirmative finding that the modification chip was primarily designed for circumvention purposes. Said another way, if Reichert sold a modification chip,

149. *Id.* at 463–64.

150. *Id.* at 452 (majority opinion).

151. *Id.* at 455.

152. *Id.* at 451.

153. *Id.* at 450.

154. *Id.*

then it must have been the case that the modification chip was primarily designed for circumvention. This is undesirable because it fails to adequately address the crime's mens rea element.

A more prudent course would be to divide the instruction into a three-prong test. This test would proceed as follows: (1) Did the defendant traffic in a technology? (2) Is the trafficking technology primarily designed to circumvent technological measures that effectively control access to a work? (3) Did the defendant know or deliberately ignore a high probability that the trafficked technology was primarily designed for circumvention purposes? This instruction properly conveys the crime's mens rea and more clearly states its constituent elements.

2. *Civil Liability Under § 1201(a)(2)(A)*

Liability attaches under § 1201(a)(2)(A) if and only if the technology at issue “is primarily designed or produced for the purpose of circumventing a [TPM] that effectively controls access to a [copyrighted] work.”¹⁵⁵ Liability does not attach if the technology is merely capable of circumventing a TPM.¹⁵⁶ The determination of a technology's primary purpose is a matter of fact to be submitted to the jury.¹⁵⁷ Expert witness testimony likely will be required.¹⁵⁸

In *Reichert*, the government presented evidence that the modification chip at issue was capable of bypassing a “game console's security measures.”¹⁵⁹ Further, “the government's expert

155. 17 U.S.C. § 1201(a)(2)(A) (2012).

156. See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1098 (N.D. Cal. 2004) (discussing the primary purpose requirement); see also *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002) (discussing permissible circumvention to engage in “fair use”).

157. *321 Studios*, 307 F. Supp. 2d at 1098 (“With regard to the second prong of both § 1201(a)(2) and § 1201(b)(1), it is impossible for this Court to determine on summary judgment whether [the technology] has only limited commercially significant purposes other than circumvention, as this is a question of fact for a jury to decide, and neither party has produced significant evidence on this issue.”).

158. See *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 941, 950 (N.D. Cal. 2009) (discussing the use of expert witness testimony in the “substantial noninfringing use” standard).

159. *Reichert*, 747 F.3d at 449; see also *United States' Response to Defendant's Motion in Limine* at 4–5, *United States v. Reichert*, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013).

witness testified that the primary purpose of modification chips is to enable a user to play pirated video games.”¹⁶⁰ Reichert did not present contrary expert witness testimony.¹⁶¹ Accordingly, it is reasonable to conclude that the jury found that the modification chip that Reichert sold had the primary purpose of circumventing a TPM that controls access to the video game console.¹⁶²

Future defendants should not repeat this mistake. A § 1201(a) defendant should go to great lengths to introduce evidence that shows non-circumventing uses for the technology at issue. Additionally, § 1204 defendants should urge that the “beyond a reasonable doubt” standard be used when determining a technology’s primary purpose. Success at this stage should immunize the defendant from criminal and civil liability.¹⁶³

3. Criminal Liability Under § 1204(a)

Section 1204(a) provides criminal liability for willfully trafficking circumvention technology.¹⁶⁴ Under § 1204(a), criminal liability attaches if and only if the government proves that the defendant “willfully and for purposes of commercial advantage or private financial gain” violated § 1201 (e.g., sold a technology that is primarily used for circumvention).¹⁶⁵

Because the legal status of the technology is a matter of fact,¹⁶⁶ the government needs to prove that a § 1204 defendant knew that he was trafficking in a technology and that the technology’s primary purpose is to circumvent TPMs.¹⁶⁷ Courts should not

160. *Reichert*, 747 F.3d at 449 (internal quotation marks omitted).

161. United States’ Motion in Limine to Exclude Evidence of “Fair Use” and Reference to “Legal” Uses for Mod Chips Under Federal Rules of Evidence 401, 402, 403, and 702, at 3–4, *Reichert*, No. 1:12 CR 177.

162. *See Reichert*, 747 F.3d at 449–50.

163. *See generally id.* at 459 n.2. (“[I]nstalling a mod chip into a console like the Wii for the purpose of enhancing its functionality, so that it can play ordinary and lawfully purchased DVDs, would also seem to fall under the reverse engineering exception at § 1201(f), so long as such a modification was not designed primarily . . . for the purpose of playing illegal, pirated video games.” (internal quotation marks omitted)).

164. *See* 17 U.S.C. § 1204(a) (2012).

165. *Id.*

166. *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1098 (N.D. Cal. 2004) (finding that a technology’s commercially significant purpose is a “question of fact for the jury to decide”).

167. 17 U.S.C. § 1201(a)(2)(A) (stating the primary purpose requirement).

interpret § 1204 to merely require that a defendant willingly sold a circumvention technology. This would undermine Congress's intent and make the distinction between civil and criminal liability practically nonexistent.¹⁶⁸ For criminal liability to attach, it must be shown beyond a reasonable doubt that a § 1204 defendant: (1) trafficked in a technology,¹⁶⁹ (2) whose primary purpose is to circumvent a technological measure that effectively protects access to a copyrighted work,¹⁷⁰ and (3) the defendant knew or was willfully blind to the technology's primary purpose.¹⁷¹

The way in which a subsequent purchaser uses the technology is not relevant to a § 1204 inquiry.¹⁷² Once the government has demonstrated that the defendant sold a technology whose primary purpose is to circumvent a TPM, evidence of subsequent non-infringing use is not a defense.¹⁷³ Nonetheless, subsequent non-infringing use may be relevant to demonstrate that a defendant was not aware of the technology's primary purpose. This would negate the crime's willful act requirement. However, civil liability may still attach under § 1201(a)(2)(A).¹⁷⁴ The effectiveness of this approach has yet to be determined.

The government produced two pieces of evidence that addressed Reichert's knowledge of the modification chip's primary purpose. The first was an Internet post in which Reichert stated, "[w]e aren't technically supposed to do [installs]," but "no one

168. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001) ("The DMCA creates civil remedies and criminal sanctions." (citations omitted)); see also H.R. REP. NO. 105-551, pt. 2, at 26 (1998) ("The Committee has endeavored to specify, with as much clarity as possible, how the right against anti-circumvention would be qualified to maintain balance between the interests of content creators and information users.").

169. 17 U.S.C. § 1201(a)(2).

170. *Id.* § 1201(a)(2)(A).

171. *Id.* § 1204.

172. See, e.g., 321 *Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1097 (N.D. Cal. 2004).

173. See *MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc.*, 622 F.3d 361, 366 (5th Cir. 2010) (citing *Corley* with approval); see also *Corley*, 273 F.3d at 443 ("[T]he DMCA . . . does not concern itself with the use of those materials after circumvention has occurred." (citations omitted)). But see *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1194 (Fed. Cir. 2004) ("[T]he DMCA emphatically *did not* 'fundamentally alter' the legal landscape governing the reasonable expectations of consumers or competitors . . .").

174. This is because § 1201(a)(2)(A) does not impose a "willfulness" requirement. See 17 U.S.C. § 1201(a)(2)(A).

cares.”¹⁷⁵ The second was Reichert’s admission to the arresting agents that he “knew the mod chips were in a gray area.”¹⁷⁶ Reichert’s only witness, Kevin Belcik, was prevented from testifying about whether Reichert believed that his conduct was illegal.¹⁷⁷ From the evidence presented, it is reasonable to conclude that the jury believed that Reichert knew that the modification chip was primarily used to circumvent copyright protection.

The dissent argued that the deliberate ignorance instruction constituted a reversible error because it “directly undermined Reichert’s only defense at trial” and negated the statute’s mens rea element.¹⁷⁸ The dissent contended that the jury instruction should have asked whether Reichert “deliberately ignored a high probability that he was breaking the law designed to effectively control access to a work copyrighted under federal law.”¹⁷⁹

The dissent’s conclusion is flawed. Notwithstanding the bar on Kevin Belcik’s testimony, Reichert conceded that “the record [was] replete with evidence that . . . Reichert was operating under the belief that his conduct was lawful.”¹⁸⁰ Further, the dissent’s proposed instruction ignores the primary purpose standard mandated by the DMCA.¹⁸¹ As discussed above, subsequent non-infringement is irrelevant once the government has established that the primary purpose of the technology is to circumvent a technological measure that effectively protects a copyrighted work and the defendant is aware of this.¹⁸²

175. *United States v. Reichert*, 747 F.3d 445, 449 (6th Cir. 2014).

176. *Id.*

177. *Id.*; see also Brief of Appellant, *supra* note 108, at 13 (“The defense attempted to introduce Mr. Reichert’s statements that he believed that modifying game console hardware was permissible under federal copyright law, but that copying and selling copied game was not.”).

178. *Reichert*, 747 F.3d at 462 (Donald, J., dissenting).

179. *Id.* at 461 (emphasis omitted).

180. Brief of Appellant, *supra* note 108, at 24.

181. 17 U.S.C. § 1201(a)(2)(A) (2012) (“No person shall . . . traffic in any technology . . . that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a [copyrighted] work . . .”).

182. For a discussion of circumvention as its own cause of action separate and apart from copyright infringement, see *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (holding that circumvention is a standalone offense); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1097 (N.D. Cal. 2004); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 303 (S.D.N.Y. 2000).

B. Consumer Rights

The DMCA has been a lightning rod in copyright law. Prior to its enactment, politicians, academicians, and members of the content industries debated the merits of circumvention liability.¹⁸³ To be sure, scholars have spilled much ink criticizing the DMCA and its circumvention provisions.¹⁸⁴ Since its enactment, the U.S. Copyright Office, pursuant to statutory mandate, has solicited public comments from interested parties regarding the effects and effectiveness of circumvention liability.¹⁸⁵ Consumers have been largely excluded from this discussion despite the DMCA's mandate to "promote electronic commerce."¹⁸⁶ This is ironic, of course, because commerce cannot exist without consumers. Consumers are not without recourse, however. Section 1201(c) of the DMCA states that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement"¹⁸⁷ Therefore, consumers may seek to attack the DMCA's anti-circumvention provisions using the first sale doctrine.¹⁸⁸

183. See, e.g., WHITE PAPER, *supra* note 19, at 231–33 (discussing fair use and circumvention liability).

184. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 421 (1999) ("The anticircumvention provision is based on the premise that it is worthwhile to make many users lose some privileged uses in order to assure that the owners of copyrighted materials can more completely capture the value of their products."); June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 393–94 (2004) ("[A]nti-circumvention legislation . . . prevents legitimate uses of copyrighted works."); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 674–75 (2000) (characterizing the DMCA as a "radical change[]" in copyright law); Samuelson, *supra* note 55, at 534 ("DMCA's overbroad anti-circumvention provisions are neither consistent with framework principles nor good for the new economy.").

185. See, e.g., *Section 104 Report*, *supra* note 21, at 27–32 (summarizing the broad range of views solicited from the public on the anti-circumvention provisions included in the DMCA); Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Library of Congress 20–21 (Oct. 27, 2003), <http://www.copyright.gov/1201/docs/registers-recommendation.pdf> (discussing the process whereby the opinions of interested parties are solicited pursuant to 17 U.S.C. § 1201(a)(1)(C)'s Notice of Inquiry).

186. REPORT OF THE REGISTER, *supra* note 22, at vi.

187. 17 U.S.C. § 1201(c) (2012).

188. See *id.* § 109.

Video game developers use “regional encoding”—also referred to as Digital Rights Management—to prohibit users from playing games in regions that differ from where the game console was sold.¹⁸⁹ For example, a PlayStation video game console purchased in the United States may not run a PlayStation video game purchased in Japan even though the game and game console would otherwise be compatible.¹⁹⁰ This practice is antagonistic to a consumer’s right to alienate her property as protected by the first sale doctrine.

The first sale doctrine establishes that once a copy of a work is lawfully sold, the copyright owner cannot control subsequent transfers of that particular work.¹⁹¹ The rationale behind the first sale doctrine is “that ownership of the material object . . . is distinct from ownership of the intellectual property.”¹⁹²

Conceived at common law,¹⁹³ the first sale doctrine has deep roots in American jurisprudence.¹⁹⁴ The United States Supreme

189. See Derek J. Schaffner, *The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J.L. & PUB. POL’Y 145, 163 (2004).

190. See, e.g., *Sony Computer Entm’t Am., Inc. v. Gamemasters*, 87 F. Supp. 2d 976, 981 (N.D. Cal. 1999) (“Games not licensed for distribution in the same territory as that of the console’s sale cannot be played on the PlayStation [console] without a device such as the Game Enhancer.” (citations omitted)).

191. See 17 U.S.C. § 109(a) (“[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”); see also *United States v. Moore*, 604 F.2d 1228, 1232 (9th Cir. 1979); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.11 (Matthew Bender ed., rev. ed. 2014) (discussing the first sale doctrine and its burden of proof).

192. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:15 (2014).

193. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013) (“The ‘first sale’ doctrine is a common-law doctrine with an impeccable historic pedigree.” (citing 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND § 360, at 223 (1628))).

194. For an early example of the common law first sale doctrine imported into copyright law, see *Stowe v. Thomas*, 23 F. Cas. 201, 206–07 (C.C.E.D. Pa. 1853).

Before publication [the author] has the exclusive possession of his invention. His dominion is perfect. But when he has published his book . . . he can have no longer an exclusive possession of [it] . . . The author’s conceptions have become the common property of his readers . . . When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters

Court first approved the doctrine at the turn of the twentieth century.¹⁹⁵ The Court affirmed the international scope of the first sale doctrine by holding that the doctrine applies to work manufactured and purchased both domestically and abroad.¹⁹⁶ Iterations of the doctrine have been codified in the various Copyright Acts.¹⁹⁷ The doctrine's international analog, the doctrine of exhaustion, is widely recognized—although not without controversy—by foreign jurisdictions.¹⁹⁸ Proponents of international exhaustion argue that the doctrine advances notions of free trade and benefits consumers.¹⁹⁹ Opponents argue that the doctrine limits a copyright holder's ability to maximize her profits by inhibiting "territorial licenses."²⁰⁰

Although not raised in *Reichert*,²⁰¹ the first sale doctrine presents a potentially powerful shield against circumvention

which exhibits to the eyes of another the ideas intended to be conveyed.

Id.

195. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349–51 (1908) (holding that an author's exclusive statutory right to "vend" was extinguished after the first sale of the work).

196. See *Kirtsaeng*, 133 S. Ct. at 1358 (holding that the first sale doctrine applies to works manufactured abroad, purchased abroad, and subsequently imported into the United States); *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 152 (1998) (holding that the first sale doctrine applies to works manufactured in the United States, purchased abroad, and subsequently imported into the United States). *But see* Damien Riehl & Jumi Kassim, *Is "Buying" Digital Content Just "Renting" for Life? Contemplating a Digital First-Sale Doctrine*, 40 WM. MITCHELL L. REV. 783, 787 (2014) (discussing how content industries use contracts to limit the first sale doctrine).

197. See 3 NIMMER & NIMMER, *supra* note 191, § 8.12. For the current statutory iteration of the first sale doctrine, see 17 U.S.C. § 109(a) (2012).

198. See generally Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333, 340–43 (2000) (discussing the mechanics of international exhaustion).

199. See, e.g., Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting Trips and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 333 n.12 (1997).

200. See S. Zubin Gautam, *The Murky Waters of First Sale: Price Discrimination and Downstream Control in the Wake of Kirtsaeng v. John Wiley & Sons, Inc.*, 29 BERKELEY TECH. L.J. 717, 737–48 (2014) (discussing "the first sale doctrine's crippling effects" on territorial licensing).

201. Judge Donald did cite several relevant articles that address the first sale doctrine; however, neither *Reichert* nor Judge Donald squarely addressed the doctrine. See *United States v. Reichert*, 747 F.3d 445, 455–64 (6th Cir. 2014) (Donald, J., dissenting).

liability.²⁰² Under a geographically neutral interpretation of the first sale doctrine, circumventing regional encoding to play a video game lawfully made and legally obtained abroad may not constitute copyright infringement.²⁰³ A prosecutor will likely argue that the first sale doctrine is irrelevant because the act of circumvention is itself proscribed.²⁰⁴ A § 1201(a)(2) defendant should rebut this claim by asserting that first sale can defeat the primary purpose element of the offense.²⁰⁵ Accordingly, a § 1201(a)(2) defendant may introduce evidence that the circumvention technology at issue is used to defeat regional encoding in a manner that is consistent with a geographically neutral first sale doctrine.²⁰⁶ If the defendant is in a jurisdiction that does not require a nexus to infringement, such as the Ninth Circuit, this argument becomes less persuasive.

Additionally, a § 1201(a)(2) defendant can aver that the circumvention technology at issue merely allows the user to retain the degree of control that she would otherwise have under the Copyright Act—namely, the right of ownership afforded under the first sale doctrine.²⁰⁷ The geographically neutral interpretation of the first sale doctrine lends further credence to this argument.²⁰⁸ Opponents may attempt to refute this argument on the grounds

202. See 17 U.S.C. § 1201(c)(1) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”). See generally Besek, *supra* note 184, at 473 (“The first sale doctrine is . . . potentially implicated when a work is distributed in a physical medium but its use is limited to certain specific machines.”); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 865 (1999) (stating that when a defendant asserts a first sale defense to a criminal charge, the government must prove beyond a reasonable doubt that the first sale doctrine is a viable defense). But see *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1116 (9th Cir. 2010) (holding that a licensee who never obtained ownership may not invoke the first sale defense because ownership was never conveyed).

203. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1371 (2013). *Kirtsaeng*’s holding extends to all copyrightable works, including video games. See *id.* at 1360.

204. See PROSECUTING IP CRIMES, *supra* note 69, at 66–67.

205. See 17 U.S.C. § 1201(a)(2)(a) (stating the primary purpose requirement).

206. This scenario is not that dissimilar from the facts of *Kirtsaeng*, in which textbooks were purchased in Thailand, imported into the United States, and resold to American customers. See *Kirtsaeng*, 133 S. Ct. at 1356.

207. See 17 U.S.C. § 109.

208. *Kirtsaeng*, 133 S. Ct. at 1364–68 (listing the “parade of horrors” that would result from a geographical interpretation of the first sale doctrine).

that the DMCA's prohibition on circumvention is separate and apart from copyright infringement.²⁰⁹ This attempt should fail if the defendant can show that (1) the copy was lawfully made²¹⁰ and (2) was legally purchased and not merely rented.²¹¹ This argument is less applicable to negate trafficking liability because it does little to negate the crime's mens rea.

A §§ 1201(a)(2) and 1204(a) defendant may also argue that the first sale doctrine limits a copyright holder's right. Courts hold that affirmative defenses to copyright infringement do not immunize circumvention liability on the grounds that the act of circumvention, not infringement, is the proscribed offense.²¹² If first sale is not an affirmative defense, but rather a limitation on the exclusive rights enjoyed by the copyright owner, then the scope of the DMCA's anti-circumvention provisions should retrench. As such, American and international copyright law suggest that uses otherwise permissible under the first sale doctrine do not offend anti-circumvention laws.²¹³

V. CONCLUSION

It is often said that hard cases make bad law. In *Reichert*, the converse of this maxim appears to be true. In an effort to combat piracy of digital works, Congress enacted legislation that made the otherwise benign act of enhancing a video game console's

209. See PROSECUTING IP CRIMES, *supra* note 69, at 67–68.

210. See *United States v. Moore*, 604 F.2d 1228, 1232 (9th Cir. 1976) (holding that the copy in question must be “unauthorized” to avoid the first sale question).

211. See *United States v. Drebin*, 557 F.2d 1316, 1326–27 (9th Cir. 1977) (stating that a sale must have occurred to trigger first sale doctrine).

212. See, e.g., *Chamberlain Grp., Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1192–93 (Fed. Cir. 2004) (holding that circumvention creates a new cause of action). *But see* *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1097 (N.D. Cal. 2004) (“Congress did not prohibit the act of circumvention because it sought to preserve the fair use rights of persons who had lawfully acquired a work.” (quoting *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1120 (N.D. Cal. 2002))).

213. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001) (“The DMCA was enacted in 1998 to implement the World Intellectual Property Organization Copyright Treaty, which requires contracting parties to ‘provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures . . . which are not authorized by the authors concerned or permitted by law.’” (emphasis added) (quoting World Intellectual Property Organization (WIPO) Copyright Treaty, *supra* note 23, art. II.)).

functionality a criminal offense. Yet, before criminal liability may attach, the government must meet the heavy burden of showing that the accused acted willfully. No doubt, this high degree of culpability is desirable given the statute's ambiguous language and the severity of its sanctions.

Unfortunately, *Reichert's* uncritical interpretation of the crime's mens rea requirement produced a criminal statute that far exceeds the Act's purpose and intent. *Reichert* has taken the DMCA's prohibition on trafficking circumvention technology one-step closer to strict liability crime. This will likely diminish consumer rights and obstruct the Act's intent to promote commerce. To avoid this undesirable outcome, courts should look critically upon *Reichert* and take due care to maintain the crime's willful mens rea.